ASIAN CENTRE FOR HUMAN RIGHTS

September 2014

INDIA: DEATH WITHOUT THE RIGHT TO APPEAL

AWARD OF ENHANCED PUNISHMENT OF DEATH BY THE SUPREME COURT

1. Executive summary and recommendations

The United Nations safeguards guaranteeing protection of the rights of those facing the death penalty specifically provide that "*6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.*"[1]

In a number of cases, the Supreme Court of India set aside acquittal by the High Courts and awarded death penalty such as in the case of Kheraj Ram of Rajasthan[2] and Satish of Uttar Pradesh[3] who were acquitted by the Rajasthan High Court and the Allahabad High Court respectively.

In a number of other cases, the Supreme Court enhanced lesser sentences of life imprisonment into death penalty. These include convictions under anti-terror laws like the Terrorist and Disruptive Activities (Prevention) Act (TADA)[4] and the Indian Penal Code (IPC). With respect to **anti-terror cases** under the TADA, the Supreme Court directly considered the appeals against the orders of the designated courts and the accused were denied the right to appeal before the High Courts as provided to those convicted under the IPC offences. Simon Anthoniyappa, Gnanaprakasham, Meesekar Madaiah and Bilavendran of Karnataka were sentenced to life imprisonment in

INSIDE THE ISSUE

1. Safeguards guaranteeing protection of the rights of those facing the death penalty, approved by Economic and Social Council resolution 1984/50 of 25 May 1984 and available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx
2. *State of Rajasthan Vs. Kheraj Ram* (Criminal Appeal No. 830 of 1996 decided on 22.08.2003)
3. *State of U.P. vs. Satish* [Criminal Appeal Nos. 256-257 of 2005 (Arising out of S.L.P. (Crl.) Nos. 1666-1667 of 2004 decided on 08.02.2005]
4. Under the TADA, the Supreme Court was the first and only appellate court.

The Supreme Court not only enhanced acquittal and lesser punishment of life imprisonment by the High Courts to death sentence but also directed the High Courts for fresh consideration of cases in which death penalty was not imposed by the High Courts. In a way, the apex court has been influencing the lower courts for imposition of death penalty.

September 2001 by the designated TADA court for their involvement in a land mine blast in 1993. The State of Karnataka filed an appeal before the Supreme Court which was time barred but the Supreme Court dispensed with the limitation and took *suo motu* cognizance. In January 2004, the Supreme Court enhanced their punishment from life imprisonment to death sentence.[5] In the **IPC offences**, the death sentence imposed on Dharmendra Singh and Narendra of Uttar Pradesh was commuted to life imprisonment by the Allahabad High Court on 19 August 1997[6] but the Supreme Court restored the death sentence awarded by the Sessions Court.[7] Similarly, death sentence imposed on Sonia Choudhary and Sanjeev Choudhary by the Sessions Court on 27 May 2004 was reduced to life imprisonment by the Punjab & Haryana High Court on 12 April 2005 but the Supreme Court enhanced the same to death penalty on 15 February 2007.[8] On 22 March 2007, the Bombay High Court commuted the death sentence of convicts Ambadas Laxman Shinde, Bapu Appa Shinde and Surya alias Suresh to life imprisonment[9] but on 30 April 2009, the Supreme Court set aside the order of the Bombay High Court and reinstated the death sentence awarded by the Sessions Court.[10] In the case of Sattan @ Satyendra and Upendra @ Guddu, the death sentence imposed by the trial Court was commuted to life imprisonment by the Allahabad High Court on 18 October 2000[11] but on 27 February 2009, the Supreme Court restored the death sentence upon Sattan and Upendra[12]

In fact, the Supreme Court directed for fresh consideration by the High Courts in some cases where death penalty was not imposed, in a way implying that death penalty should have been imposed. It is a clear case of influencing the lower courts. In the case of commutation of death penalty of Kunal Majumdar into life imprisonment by the High Court of Rajasthan on 11 July 2007[13], the Supreme Court in an order dated 12 September 2012 set aside the order of the High Court and remitted the matter back to the High Court for fresh order on the sentence.[14] By the judgment dated 13 February 2013, the Division Bench of the High Court of Rajasthan at Jodhpur reconfirmed the life sentence on convict, Kunal Majumdar.[15]

However, convict Devendra Nath Rai has not been as lucky as Kunal Majumdar. Rai, an Army Jawan, was accused of murder of his colleagues on 15 October 1991 and sentenced to death by the Court Martial. The Allahabad High Court converted the death sentence to life imprisonment on the ground that the case did not fall in the "*rarest of the rare*" category. However, the Supreme Court on 10 January 2006 directed the Allahabad High Court to reconsider its judgment on the quantum of sentence while noting that the High Court without considering the balance sheet of aggravating and mitigating circumstances abruptly concluded the case as not being covered by the "*rarest of rare*"

5. Simon & Ors vs State Of Karnataka, Appeal (crl.) 149-150 of 2002, (2004)2 SCC694
6. State of U.P. Vs. Dharmendra Singh & Anr [AIR1999 SC3789]
7. Ibid
8. *Sonia and Sanjeev vs. Union of India*, [AIR2007SC1218]
9. State Of Maharashtra vs Ankush Maruti Shinde And Ors, [Crl Appeal Nos. 881-882 of 2009 (Arising out of SLP (Crl.) Nos.8457-58 of 2008)] Bombay High Court, 22 March 2007
10. Ankush Maruti Shinde and Ors. Vs. State of Maharashtra [AIR2009SC2609]
11. Sattan @ Satyendra & Ors vs State Of U.P. [2001 CriLJ 676], Allahabad High Court, 18 October 2000
12. State of U.P. Vs. Sattan @ Satyendra and Ors [(2009)4SCC736]
13. Kunal Majumdar Vs. State of Rajasthan [(2012)9SCC320]
14. Ibid
15. State of Rajasthan vs Kunal Majumdar, Rajasthan High Court, 13 February 2013 [Crl Murder Ref. 361, Crl Appl No.1/2007, Crl Appl No.243 of 2007 and Jail Appl No.313 of 2007] http://courtnic.nic.in/jodh/judfile.asp?ID=CRLA&nID=243&yID=2007&doj=2%2F13%2F2013

category.[16] Following the direction of the Supreme Court, the Allahabad High Court sat on it for eight years, dismissed the Writ Petition of Rai for "want of prosecution" and restored the case vide order dated 28.01.2014 and transferred the same to the Armed Forces Tribunal, Lucknow in view of Section 13 of the Armed Forces Act, 2007.[17] The trial has been going on for last 23 years!

"The Review Petitions or Curative Petitions filed before the Supreme Court cannot be considered as an appeal "to a court of higher jurisdiction" as provided under the United Nations safeguards guaranteeing protection of the rights of those facing the death penalty. India is not complying with the UN Safeguards on death row convicts.

While enhancement of lesser punishments to death sentence by the Supreme Court is constitutional in India, whether it meets the United Nations requirement that "*anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory*" is questionable.

The Review Petition which can be filed against the orders of the Supreme Court as per Article 137 of the Constitution of India[18] and rules made under Article 145 of the Constitution of India[19] cannot be considered as an appeal "*to a court of higher jurisdiction"* as provided in the *United Nations safeguards guaranteeing protection of the rights of those facing the death penalty* despite the same now being heard in open courts as per the Supreme Court judgement of September 2014.[20] Under the Supreme Court Rules of 1966,[21] a review petition is to be filed within thirty days from the date of judgment or order and as far as practicable, without oral arguments, to the *same Bench of Judges* which delivered the judgment or order sought to be reviewed. As the *same Bench of Judges* considers the review petition,

16. Union of India (UOI) and Ors. Vs. Devendra Nath Rai [(2006)2SCC243]
17. Order of the Allahabad High Court in Writ A No. 35206 of 1991, Devendra Nath Rai Vs Union of India is available with ACHR.
18. Article 137. Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.
19. **Article 145 (Rules of Court, etc.)**
    1. Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including -
       a. rules as to the persons practising before the Court;
       b. rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered;
       c. rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III; (cc) rules as to the proceedings in the Court under article 139A;
       d. rules as to the entertainment of appeals under sub-clause (c) of clause (1) of article 134;
       e. rules as to the conditions subject to which any judgement pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court or such review are to be entered;
       f. rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein;
       g. rules as to the granting of bail;
       h. rules as to stay of proceedings;
       i. rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexations or brought for the purpose of delay;
       j. rules as to the procedure for inquiries referred to in clause (1) of article 317.
       k. Subject to the provisions of clause (3), rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts.
       l. The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five: Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than article 132 consists of less than five Judges and in the course of the hearing of the appeal of the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion.
    2. No judgement shall be delivered by the Supreme Court save in open Court, and no report shall be made under article 143 save in accordance with an opinion also delivered in open Court.
    3. No judgement and so such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgement or opinion.
20. Death row convict may be heard in open court: SC, The Hindu, 2 September 2014, available at http://www.thehindu.com/news/national/death-row-convict-may-be-heard-in-open-court-sc/article6372441.ece
21. Supreme Court of India, Manual of Judicial Procedure (Judicial Side) available at http://www.sci.nic.in/CGP/manual_judicial_side.pdf

it cannot be considered as an appeal "*to a court of higher jurisdiction*". Further, as the *same Bench of Judges* reviews the matter, a different order is most likely to be an exception.

Even a curative petition filed before the Supreme Court as per the judgement in the case of *Rupa Ashok Hurrah vs. Ashok Hurrah* [2002 (4) SCC 388] after dismissal of a review petition to cure gross miscarriage of justice cannot be considered as an appeal to a court of higher jurisdiction as provided under the *United Nations safeguards guaranteeing protection of the rights of those facing the death penalty*. The curative petition is restrictive and the Supreme Court held that "… *curative petitions ought to be treated as a rarity rather than regular and the appreciation of the Court shall have to be upon proper circumspection having regard to the three basic features of our justice delivery system to wit, the order being in contravention of the doctrine of natural justice or without jurisdiction or in the event of there is even a likelihood of public confidence being shaken by reason of the association or closeness of a judge with the subject matter in dispute*." As per the rules of the Supreme Court, a curative petition can be filed only if a Senior Advocate certifies that it meets the requirements of the case. Further, such petition is to be first circulated, in chambers before a Bench comprising of three senior most Judges and such serving Judges who were members of the Bench which passed the judgment/order.[22]

In a number of cases cited in this report, the President of India had commuted death sentences into life imprisonment such as of Kheraj Ram, Satish and Dharmendra Singh, and Narender.[23] There is no doubt that the condemned prisoners had to go through another procedure to file the mercy pleas following enhancement of sentence by the Supreme Court.

ACHR recommends that denial of the right to appeal as a result of the enhancement of punishment by the Supreme Court in the form of death penalty should be a ground for granting mercy i.e. the commutation of the death sentence into life imprisonment. The President ought to automatically grant mercy to those condemned prisoners whose acquittal or lesser sentences are enhanced to death penalty by the Supreme Court.

2. Acquittal enhanced to death sentence

In a number of cases, the Supreme Court of India enhanced acquittal by the High Courts into death penalty.

Case 1. Kheraj Ram, Rajasthan

Brief description of the case:

Kheraj Ram was accused of killing his wife Amru, two daughters Kumari Meera (aged about 12 years) and Kumari Kesi (aged about 9 years) and brother in law Achla at village Baytu in Barmer district, Rajasthan in the intervening night of 9 and 10 October 1992. The police investigated into the allegations and came to the conclusion that accused was responsible for the killings. Initially, a case was registered for commission of offences punishable under Section 302 and Section 307 of the Indian

22. Supreme Court of India, Manual of Judicial Procedure (Judicial Side) available at http://www.sci.nic.in/CGP/manual_judicial_side.pdf
23. *See* 'Kalam OKs mercy plea of Jaipur Death Row convict', The Indian Express, 19 October 2006, at: http://archive.indianexpress.com/news/kalam-oks-mercy-plea-of-jaipur-death-row-convict/15009/; and 'Angel of mercy' Pratibha Patil commutes 30 death row sentences, India Today, 4 June 2012, at:http://indiatoday.intoday.in/story/pratibha-patil-commutes-30-death-row-sentences/1/198933.html

Penal Code, 1860. Subsequently, it was modified to Section 302 of the IPC when all the four died. It was disclosed that the accused suspected his wife of infidelity.[24]

"Both Kheraj Ram of Rajasthan and Satish of Uttar Pradesh whose life imprisonment awarded by the High Courts were enhanced to death sentence by the Supreme Court, President commuted death sentences to life imprisonment. However, both had to go through another procedure to file the mercy pleas."

Observation/judgment of trial Court:

The trial court, while convicting the accused, placed reliance over some of the evidence led by the prosecution as highlighted below:

(i) the recovery of the *Jooti*, blood-stained *Dhoti* of the accused and blood-stained *Kulhari* made on the information and at the instance of the accused;

(ii) the conduct of the accused, which according to the trial court, was found abnormal as he was smoking the Chilam when the witnesses from the nearby Dhanis came at the scene of the occurrence and the four dead bodies were lying in the house of the accused;

(iii) the motive that the accused was suspecting the fidelity of his wife Smt. Amru;

(iv) the quarrel took place between the accused and deceased, which was heard by PW 5 Smt. Kanu and PW 6 Smt. Veeru;

(v) the accused, after commiting the murder took-up the shoes of deceased Achla, went to the house of his mother-in-law PW 7 Smt. Saro; and

(vi) he was last seen in the Dhani alongwith the deceased.

On 7 September 1994, the trial court on consideration of the above evidence found the accused guilty of offence punishable under Section 302 of the IPC and considering the brutal nature of the killing awarded the death sentence on the accused.[25]

Observation/judgment of the High Court:

In its order dated 27 March 1995 the Division Bench of Justices B Arora and R Yadav of the Rajasthan High Court noted that *"There is no eye witness to the occurrence and the prosecution case mainly rests upon the circumstantial evidence and the extra-judicial confession made by the accused before PW 12 Simratha."* The High Court concluded that the circumstances relied upon by the trial Court for conviction were found as "not to have been proved sufficiently to establish the guilt of the accused" and directed acquittal of Kheraj Ram. The High Court observed *"The prosecution has, therefore, failed to establish the case against accused-appellant Kheraj Ram and the circumstances relied upon by the prosecution and believed by the learned trial Court are not substantially established against him from the evidence produced by the prosecution and on the basis of these evidence, it is hazardous to convict the accused-appellant and confirm the sentence of death imposed by the learned trial Court."*[26]

The High Court while passing order of acquittal noted *"In the result, the appeal, filed by accused-appellant Kheraj Ram, is allowed. The conviction of the accused-appellant on all the counts is, therefore, set-aside. The sentence of death imposed against the accused-appellant by the learned trial Court and sent*

24. State of Rajasthan Vs. Kheraj Ram [(2003)8SCC224]
25. Kheraj Ram vs State of Rajasthan [1995 CriLJ 3113], Rajasthan High Court, 27 March 1995
26. Ibid

for confirmation, is not confirmed and Kheraj Ram is acquitted of all the charges levelled against him and the reference made by the learned trial Court is rejected. The accused-appellant is in jail. He may be released forthwith if not required in any other case."[27]

Observation/judgment by the Supreme Court:

On 22 August 2003, a bench of the Supreme Court comprising of Justices D Raju and Arijit Pasayat set aside the order of acquittal by the High Court and restored the death sentence on the accused as awarded by the trial Court. Rejecting all the conclusions arrived at by the High Court, the Supreme Court ruled *"Therefore, the circumstances highlighted by the prosecution present the complete picture which completely rules out the role of any other person and unerringly as well as inevitably point the finger at the accused and in that view of the matter the trial Court was justified in convicting the accused and consequently the High Court was in error in reversing the conviction. So far as conviction is concerned, High Court's judgment is set aside and that of trial Court is restored"*. The Supreme Court found the sentence of death as the most appropriate. It observed[28]:

> *"The factual matrix as described by the prosecution and established by the evidence on record shows the cruel and diabolic manner in which the killings were conceived and executed. The accused did not act on any spur of the moment provocation. It was deliberately planned and meticulously executed. There was not even any remorse for such gruesome act. On the contrary, after the killing the accused tried to divert attention and used PW-9 as the cat's-paw. He went on taking diversive tactics to suit his purpose. The calmness with which he smoked 'chilam' was an indication of the fact that the gruesome act did not even arouse any human touch in him. On the contrary, he was satisfied with what he had done. In a given case, a person having seen a ghastly crime may act in a different way. That itself in another case may not constitute a suspicious circumstance. But when the entire chain of events and circumstances are comprehended, the inevitable conclusion is that the accused acted in the most cruel and inhuman manner and the murder was committed in extremely brutal, grotesque, diabolical, revolting and dastardly manner. The victims were two innocent children and a helpless woman……"*

Final status:

In 2006, the mercy petition of Kheraj Ram was allowed by then President APJ Abdul Kalam and his death sentence was commuted to life imprisonment.[29]

Case 2. Satish, Uttar Pradesh

Brief description of the case:

On 16 August 2001, Vishakha @ Akansha, a minor school girl, did not return home from school in a village in Uttar Pradesh. Next morning she was found dead in a sugarcane field of a farmer. It was found that she was killed after being raped. One Satish was arrested by the police for involvement in the crime and charged under various Sections of the IPC including 376(2) and 302.[30]

27. Ibid
28. State of Rajasthan Vs. Kheraj Ram [(2003)8SCC224]
29. See "Kalam OKs mercy plea of Jaipur Death Row convict", The Indian Express, 19 October 2006, available at: http://archive.indianexpress.com/news/kalam-oks-mercy-plea-of-jaipur-death-row-convict/15009/
30. State of U.P. vs. Satish [(2005)3SCC114]

Observation/judgment of trial Court:

The trial court found that the circumstances highlighted by the prosecution were sufficient to fasten guilt on the accused. Accordingly, the trial court convicted the accused under Sections 363, 366, 376(2), 302 and 201 of the Indian Penal Code, 1860. The trial court held the crime to be one falling under the "*rarest of rare*" category. Accordingly, death sentence was imposed on him for the offence under Section 302 of the IPC and various sentences and fines were imposed for other offences.[31]

Observation/judgment of the high court:

The Allahabad High Court held that prosecution had failed to prove its accusations and ordered acquittal of the accused. The High Court concluded that the case rested on circumstantial evidence and the circumstances highlighted by the prosecution did not inspire confidence. The High Court highlighted three circumstances to arrive at these conclusions as given below[32]:

i) It was held that examination of PWs. 3 and 5 after long passage of time rendered their version unacceptable and improbable. The prosecution did not offer any explanation for such delayed examination.

ii) In the FIR name of the accused was not indicated.

iii) Presence of the accused nearby the place from where the dead body was recovered, as deposed by PW-2, may be a suspicious circumstance but was not determinative.

Observation/judgment of the Supreme Court:

On 8 February 2005, a Bench of Justices Arijit Pasayat and S.H. Kapadia of the Supreme Court overturned the High Court ruling and restored the death sentence awarded by the trial court. Disagreeing with the conclusions arrived at by the High Court, the Supreme Court stated *"the High Court's order is clearly untenable and unsustainable and deserves to be set aside"*. It held that the accused deserved death sentence and further stated that *"……we have no hesitation in holding that the case at hand falls in the rarest of rare category and death sentence awarded by the trial court was appropriate"*. The Supreme Court further stated *"if the punishment in such heinous crimes were not in proportionate to the offence, the consequence would be serious and widespread for the society"*.[33]

Final status:

In 2012, then President Pratibha Patil commuted the death sentence of condemned prisoner Satish to life imprisonment.[34]

3: Life imprisonment enhanced into death sentence

In a number of other cases, the Supreme Court enhanced lesser sentences of life imprisonment into death penalty. These include convictions under anti-terror laws like the Terrorist and Disruptive

31. Ibid
32. Ibid
33. Ibid
34. *See* "'Angel of mercy' Pratibha Patil commutes 30 death row sentences, India Today, 4 June 2012, available at: http://indiatoday.intoday.in/story/pratibha-patil-commutes-30-death-row-sentences/1/198933.html

India denied fair trial and procedural rights to those convicted under the TADA. The appeal against the designated TADA courts lied with the Supreme Court which confirmed the death sentences imposed by the designated courts. Those convicted to death under the TADA are denied the procedural right of confirmation of death by the High Courts as provided to those convicted under IPC offences.

Activities (Prevention) Act (TADA)[35] and the Indian Penal Code (IPC)

Case 1. Simon, Gnanaprakasham, Meesekar Madaiah and Bilavendran, Karnataka

Brief description of the case:

On 9 April 1993, a land mine explosion by members of forest brigand Veerappan in Palar, Karnataka killed 22 persons and injured several others. On 29 September 2001, a designated TADA court was constituted for the trial in Mysore. The case was filed against 121 persons and a total of 50 persons were arrested and prosecuted. The trial resulted in conviction of four namely Simon, Gnanaprakasham, Madaiah and Bilavendran, while the remaining accused were acquitted. They were convicted under Sections 3, 4, 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987; Sections 143, 148, 307, 302, 332, 333, 324, 120(B) and 149 of the Indian Penal Code, Section 3 of the Explosive Substances Act and Section 25 of the Indian Arms Act.[36]

Observation/judgment of Special Court under TADA:

The Special Judge of the TADA Court, Mysore held that the offence falls under the "*rarest of the rare*" cases. However, the trial court did not award the extreme penalty of death on the ground that *"it is not the case of prosecution that the accused had started their career as criminals and developed such notoriety; and that it was accused No.1, Veerappan, who alone started his criminal activity which reached such notoriety that by creating terror in the mind of the people he took inhabitants from surrounding areas to his assistance and compelled them to fall in his line"*. The trial court also observed that it appears that these accused are some such people joining the gang of Veerappan involved in the criminal act as directed by him.[37]

Observation of the Supreme Court:

On 29 January 2004, the bench of Justices Y K Sabharwal and B N Agrawal of the Supreme Court enhanced the life imprisonment of the four convicts to death penalty. The Bench while rejecting the mitigating circumstances considered for awarding life imprisonment by the trial court observed *"We are conscious of the fact that the power to enhance death sentence from life should be very rarely exercised and only for strongest possible reasons and not only because the appellate court is of that view. The question of enhancement of sentence to award death penalty can, however, be considered where the facts are such that to award any punishment less than maximum would shock the conscious of the court. The fact of dismissal of special leave petition filed by the State seeking enhancement of sentence on the ground of limitation does not take away the power of this Court to make an order enhancing the sentence in these appeals if the facts call for such an order being made. The court has to consider the nature of the crime as well as the accused."*

The Supreme Court ruled that the appellants *"do not deserve any sympathetic consideration. There is no evidence or foundation for the conclusion that they acted under the duress of Accused No.1. The facts of*

35. Under the TADA, the Supreme Court was the first and only appellate court.
36. Simon And Ors vs State Of Karnataka [Appl (crl.) 430-432 of 2002], http://judis.nic.in/supremecourt/imgst.aspx?filename=21075
37. Simon and Ors. Vs. State of Karnataka [(2004)2SCC694]

the present case do not show that the appellants were compelled to fall in line with the criminal activity of accused No.1 or that they joined his group on account of any duress or compulsion. The manner in which the crime was committed clearly shows that any person can contemplate the disastrous effect of blasting of landmines. It is evident that the crime was diabolically planned. The appellants are threat and grave danger to society at large. They must have anticipated that their activity would result in elimination of large number of lives. As a result of criminal activities, the normal life of those living in the area has been totally shattered. It would be mockery of justice if extreme punishment is not imposed".[38]

Final status:

On 21 January 2014, the Supreme Court commuted the death sentences of Simon, Gnanaprakasham, Meesekar Madaiah and Bilavendran to life imprisonment on the grounds of delay in disposing off their mercy petitions filed on 03.05.2005. President Pranab Mukherjee had rejected their mercy petitions on 8 February 2013.[39]

Case 2. Sonia Choudhary and Sanjeev Choudhary, Haryana

Brief description of the case:

Sonia Choudhary and her husband Sanjiv Choudhary were accused of killing eight family members over property dispute at their farmhouse at Litani village in Haryana on the night of 23 August 2001. On completion of the investigation, chargesheet was submitted against Sonia Choudhary and her husband Sanjiv Choudhary along with eight other accused persons.[40]

Observation/judgment of trial Court:

On 31 May 2004, the District and Sessions Court, Hisar, Haryana awarded death sentence to Sonia and her husband Sanjiv on conviction under Section 302 read with Section 34 and Section 120-B of the IPC for killing eight family members at their farmhouse at Litani village on the night of 23 August 2001. The trial court held that the crime was one of the *"rarest of rare"* cases warranting death sentence. The eight other accused were, however, acquitted by the trial court for want of evidence.[41]

Observation/judgment of High Court:

By order dated 12 April 2005, the Punjab & Haryana High Court confirmed their conviction but commuted the sentence of death into life imprisonment. The High Court held that sentence of life imprisonment would be appropriate and cited **repentance** of the convicts as ground for commutation of the sentence.[42]

Observation/judgment of the Supreme Court:

By order dated 15 February 2007, a bench of Justices B Agrawal and P. P. Naolekar set aside the High Court order and reinstated the trial court order awarding death sentence. Stating that the High Court was not justified in commuting the death sentence to life imprisonment, the Bench observed that *"The fact that murders in question were committed in such a diabolic manner while the victims were sleeping,*

38. Ibid
39. Shatrughan Chauhan & Anr Vs Union of India & Ors [(2014) 3 SCC 1]
40. Ram Singh vs. Sonia & Ors. [(2007)3SCC1]
41. Ibid
42. *See* 'Birthday basher', The Week, 13 April 2012, available at: http://week.manoramaonline.com/cgi-bin/MMOnline.dll/portal/ep/theWeekContent.do?tabId=13&contentId=11398977&BV_ID=@@@

without any provocation whatsoever from the victims' side indicates the cold-blooded and premeditated approach of the accused to cause death of the victims. The brutality of the act is amplified by the grotesque and revolting manner in which the helpless victims have been murdered which is indicative of the fact that the act was diabolic of most superlative degree in conception and cruel in execution and that both the accused persons are not possessed of the basic humanness and completely lack the psyche or mind set which can be amenable for any reformation. If this act is not revolting or dastardly, it is beyond comprehension as to what other act can be so. In view of these facts we are of the view that there would be failure of justice in case death sentence is not awarded in the present case as the same undoubtedly falls within the category of rarest of rare cases……"[43]

Final status:

On 21 January 2014, the Supreme Court commuted the death sentences of Sonia and Sanjeev to life imprisonment on the grounds of delay in disposing off their mercy petitions filed on 12.02.2008. President Pranab Mukherjee had rejected their mercy petitions on 29 June 2013.[44]

Case 3. Ankush Maruti Shinde and others, Maharashtra

Brief description of the case

On 5 June 2003, five persons including minors were killed at village Vihitgaon in Nasik district, Maharashtra. One of the deceased, a minor girl, was gang raped before being killed. Six persons namely Ankush Maruti Shinde, Rajya Appa Shinde, Ambadas Laxman Shinde, Raju Mhasu Shinde, Bapu Appa Shinde and Surya alias Suresh were arrested by police and charged under Sections 395 and 302 of the IPC read with Section 34 of the IPC, Sections 376(2)(g) and 307 of the IPC read with Section 34 of the IPC and Sections 396 and 397 of the IPC read with Section 395 and Section 398 of IPC.[45]

Observation/judgment of trial Court:

The trial court in support of the death sentence imposed stated *"……..that accused had committed brutal murder and their acts were inhuman. They were indifferent and away from humanity. Moreover, such type of incident does create shock in the collective conscious of the society. In such circumstances though the accused are between 25 to 30 years of age, but the enormity of the crime and gravity of the situation in which the offence is committed out weights the consideration of the ages of the offenders. And in such circumstances, I am constrained to hold that this is one of the rarest of the rare case."*[46]

Observation/judgment of High Court:

By order dated 22 March 2007, the Bombay High Court confirmed the death sentence of three namely Ankush Maruti Shinde, Rajya Appa Shinde, and Raju Mhasu Shinde as it found that *"The aggravating circumstances far outweigh the mitigating circumstances"* against them. However, the High Court commuted the death sentence of the remaining three namely Ambadas Laxman Shinde, Bapu Appa Shinde and Surya alias Suresh to life imprisonment as it felt that the role attributed to them was lesser one and also the allegation that they had raped Vimalabai could not be proved beyond reasonable doubt. While commuting the death sentence, the High Court considered the mitigating circumstances

43. Ram Singh vs. Sonia & Ors. [(2007)3SCC1]
44. Shatrughan Chauhan & Anr Vs Union of India & Ors [(2014) 3 SCC 1]
45. State Of Maharashtra vs Ankush Maruti Shinde And Ors, [Crl Appeal Nos. 881-882 of 2009 (Arising out of SLP (Crl.) Nos.8457-58 of 2008)] Bombay High Court, 22 March 2007
46. Ibid

such as tender age, no previous antecedent to show them as the habitual criminals or offenders, and that they are beyond reformation.[47]

Observation/judgment of the Supreme Court:

By order dated 30 April 2009, a Bench of Justices Arijit Pasayat and Mukundakam Sharma of the Supreme Court set aside the order of the Bombay High Court and reinstated the sentence of death against three accused, Ambadas Laxman Shinde, Bapu Appa Shinde and Surya alias Suresh. Disagreeing with the judgment of the High Court, the Bench ruled that *"the case at hand falls under the rarest of rare category"* and *"all the six accused persons deserve death sentence"*. It further observed *"There was no reason to adopt a different yardstick for A2, A3 and A5. In fact, A3 was the main person. He assaulted PW1 and took the money from the deceased"*.[48]

Final status:

The mercy petitions of the six death row convicts namely Ankush Maruti Shinde, Rajya Appa Shinde, Ambadas Laxman Shinde, Raju Mhasu Shinde, Bapu Appa Shinde and Surya alias Suresh have been pending with the Governor of Maharashtra.[49]

The mercy petition of one of the death row convicts Ankush Maruti Shinde has become redundant after it was confirmed by the Additional Sessions Court in Nashik on 7 July 2012 that he was a juvenile at the time of the commission of offence following an inquiry into his age. The Court found that Ankush Maruti Shinde's age on the date of the crime was 17 year, nine months and fifteen days.[50] Ankush Maruti Shinde had to spend more than nine years in prison, six of which were spent in a solitary cell as a death-row convict.[51]

Case 4. Sattan @ Satyendra and Others, Uttar Pradesh

Brief description of the case:

In the intervening night of 30 and 31 August 1994, six persons namely, Sheo Pal Singh, Smt. Kunti Devi, Shiv Singh, Manjeet, Khushal and Neetu were killed in village Saloni under Bahadurgarh police station, Ghaziabad, Uttar Pradesh. Four persons namely Sattan @ Satyendra, Upendra alias Guddu, Hari Pal (son of Kiran Singh) and Hari Pal (son of Ram Charan) were identified as accused. They were charged under Section 148 and Section 307 ofthe IPC read with Section 149 IPC and Section 302 read with Section 149 of the IPC.[52]

Observation/judgment of trial Courts:

By its judgment and order dated 15 August 1999 the trial court, Ghaziabad in Session Trial Nos. 375 of 96 and 376 of 96 imposed death sentences on Sattan @ Satyendra, Upendra, Hari Pal, son of Kiran Singh and Hari Pal, son of Ram Charan for the murder of the six persons in Saloni village, Ghaziabad.

47. Ibid
48. Ankush Maruti Shinde and Ors. Vs. State of Maharashtra [(2009)6SCC667]
49. RTI reply No.RB-2013/Admin/RTI/23805 dated 15 June 2013 received from PIO & Under Secretary to Governor (Admin), Raj Bhavan, Mumbai by Asian Centre for Human Rights
50. *See* 'After six years on death row, spared for being a juvenile', The Times of India, 21 August 2012 at: http://timesofindia.indiatimes.com/india/After-six-years-on-death-row-spared-for-being-a-juvenile/articleshow/15577973.cms
51. *See* 'Relief for a juvenile' Frontline, Volume 29 - Issue 17, August 25-September 7, 2012 at: http://www.frontline.in/static/html/fl2917/stories/20120907291701100.htm
52. State of U.P. Vs. Sattan @ Satyendra and Ors [(2009)4SCC736]

The trial court took into consideration the aggravating circumstances against the accused for imposing the death penalty.[53]

Observation/judgment of the High Court:

On 18 October 2000, the Allahabad High Court while commuting the death sentence of Sattan and Upendra to life imprisonment observed that there were certain mitigating circumstances which warranted alteration of the death sentence to life imprisonment. The mitigating and extenuating circumstances pointed out to justify the same are as follows:[54]

"(i) that number of casualties cannot be sole criterion for awarding death sentence;

(ii) that though in a criminal case compromise was filed, the police however at the instance of deceased Sheo Pal raided the house of accused Mukesh and Guddu alias Upendra and this excited the accused to commit the alleged crime;

(iii) that PW 1(smt. Bala) the sole eye witness did not assign specific role to each of the two accused-respondents;

(iv) that according to FIR story, the three named accused persons along with 4-5 others committed the crime and therefore, possibility of unknown persons having taken the active part could not be ruled out;

(v) that there is nothing on record to show that accused- respondents Sattan alias Satyendra and Guddu alias Upendra acted in a brutal and cruel manner while committing the crime;

(vi) that there is nothing on record to show that K. Guddu was murdered during pendency of the case by the present accused-respondents, so that there could be no evidence against them;

(vii) that the assailants did not do away with Smt. Bala (PW 1) Km. Guddi (17 years), baby Kapil (3 years) and a child to screen the offence; (viii) that the assailants showed mercy on Smt. Bala and did not cause any harm to her; and

(ix) that respondent Sattan alias Satyendra was a young boy of 20 years of age at the time of incident".

Observation/judgment of the Supreme Court:

On 27 February 2009, a Division Bench comprising Justices Arijit Pasayat and Mukundakam Sharma of the Supreme Court affirmed the acquittal directed by the High Court with respect to two accused namely Hari Pal, son of Kiran Singh, and Hari Pal, son of Ram Charan. However, with respect to accused Sattan and Upendra the Division Bench remarked that the High Court should not have commuted their death sentence to life terms. While restoring the death sentence against them, the Supreme Court had concluded *"The case at hand falls in the rarest of rare category. The depraved acts of the accused call for only one sentence that is death sentence"*. It further observed *"Murder of six members of a family including helpless women and children having been committed in a brutal, diabolic and bristly manner and the crime being one which is enormous in proportion which shocks the conscious of law, the death sentence as awarded in respect of accused Sattan and Guddu was the appropriate*

53. Sattan @ Satyendra & Ors vs State Of U.P. [2001 CriLJ 676], Allahabad High Court, 18 October 2000
54. Ibid

sentence......"[55]

Final status:

In 2011, then President Pratibha Patil allowed the mercy petitions of Sattan and Upendra alias Guddu and their death sentences were commuted to imprisonment for life for the remainder of their natural lives.[56]

Case 5. Dharmendra Singh and Narendra, Uttar Pradesh

Brief description of the case:

In May 1994, five members of a family namely Pitamber Singh (about 75 years), Ramwati Devi (about 32 years), Ravindra and Narendra (both aged 12 years) and Reeta (about 15 years) were murdered in Agra, Uttar Pradesh. Dharmendra Singh and Narendra Yadav along with four others were accused of committing the murders and charged with offences punishable under Sections 147/148/149/302 of the IPC. The dispute started over property and sexual harassment of one of the deceased minor girls.[57]

Observation/judgment of Sessions Courts:

On 5 December 1995, the trial court on considering the material placed by the prosecution came to the conclusion that the prosecution had proved the charges against Dharmendra Singh and Narendra Yadav and held them guilty of the murders. Terming the crime as falling under the "*rarest of rare*", the trial Court awarded death sentence to them by concluding that the crime in question was a dastardly crime resulting in the loss of five innocent human beings for the purpose of achieving their sadistic goals to avenge their respective grouse against the family members.[58]

Observation/judgment of the High Court:

The Allahabad High Court vide its judgment dated 19 August 1997 upheld the conviction recorded by the trial Court but commuted the death sentence to life imprisonment. The High Court concluded that the sentence of death was not called for on the ground that Dharmendra Singh and Narendra Yadav had languished in the death cell for 3 years i.e. from 3 June 1994 and 28 May 1994 during the pendency of their appeals before the High Court.[59]

Observation of the Supreme Court:

On 21 September 1999, the Supreme Court set aside the judgment of the Allahabad High Court and enhanced the life imprisonment to death sentence of the two accused. While reversing the judgment of the High Court, the bench of justices Santosh Hegde and Syed Shah Mohammed Quadri of the Supreme Court observed *"The High Court has erred in coming to this conclusion both factually as well as inferentially. First of all these respondents were not in death cell for 3 years nor is there a law which says that a person in death cell for 3 years ipso facto is entitled for commutation of death sentence. While*

55. State of U.P. Vs. Sattan @ Satyendra and Ors [(2009)4SCC736]
56. *See* 'MHA Report Card for July, 2011' available at: http://www.pib.nic.in/newsite/erelease.aspx?relid=73616
57. State of U.P. Vs. Dharmendra Singh & Anr [(1999)8SCC325]
58. Ibid
59. Ibid

it is true that prolonged trial or execution of the death sentence beyond all reasonable period may be a ground for commuting the death sentence in a given case, it will be highly erroneous to lay down as a principle in law or draw an inference on fact that awarding of death sentence is improper in cases where accused persons are in custody for 3 years or more, even though the facts of the case otherwise call for a death sentence. If the view taken by the High Court in this case is to be accepted as a correct principle then practically in no murder case death sentence can be awarded, since in this country normally a murder trial and confirmation of death sentence takes more than 3 years".[60]

While enhancing the sentence the Supreme Court stated that *"holistic examination of the material on record shows that the barbaric offence in question could only be termed as a 'rarest of the rare' case"*. The Court also found no *"mitigating circumstances"* in favour of Dharmendra Singh and Narendra Yadav.[61]

Final status:

In June 2010, then President Pratibha Patil commuted the death sentence of Dharmendra Singh and Narendra Yadav to life imprisonment.[62]

4. Order for fresh trial by the High Courts for considering award of death sentence

In fact, the Supreme Court directed for fresh consideration by the High Courts in some cases where death penalty was not imposed, in a way implying that death penalty should have been imposed by the High Courts.

Case 1. Kunal Majumdar, Rajasthan

Brief description of the case:

Kunal Majumdar of Rajasthan was accused of rape and murder of his domestic help identified as Bharti Manjhi, daughter of one Laltu Manjhi of West Bengal. Acting upon a complaint received, a case was registered and after investigation a police report was filed as per provisions of Section 173 of the Criminal Procedure Code (CrPC) before the competent court. The competent court committed the report to the court of Sessions and the court of Sessions framed charges for commission of offences punishable under Sections 302 and 376 of the Indian Penal Code against the accused.[63]

Observation/judgment of Trial Court:

The trial court concluded that the crime committed by the accused comes within the purview of the "rarest of rare" doctrine and awarded death sentence. The trial court noticed that deceased Kumari Bharti Manjhi was a minor girl of 14 years and she was working as maid servant with the accused appellant. The accused exploited poverty of Bharti Manjhi and her family and caused her death after making an effort to commit rape when the minor girl was under his custody. Having considered the facts, the trial court satisfied itself that no other sentence except the death sentence shall be appropriate

60. Ibid
61. Ibid
62. *See* 'Who Has She Pardoned?' India Today, 15 June 2012, at: http://indiatoday.intoday.in/story/pratibha-patil-mercy-petitions-accepted/1/200860.html
63. Kunal Majumdar Vs. State of Rajasthan [(2012)9SCC320]

to be awarded in existing set of circumstances.[64]

The order of the Supreme Court to reconsider the cases if the convict is not sentenced to death has the potential to creates bizarre situation wherein the same High Court may award two different judgements based on the same facts and circumstances. It establishes that death penalty is indeed judge centric.

Observation/judgment of High Court:

On 11 July 2007, the Division Bench of the High Court of Rajasthan at Jodhpur commuted the death sentence to life imprisonment stating that the "injuries sustained resulting into death did not suggest use of severe force in order to conclude the same as one of brutal and inhuman." The Division Bench observed *"Where the convictions have not been challenged by the accused, the sentence part is the only aspect on which we have to seriously consider. The brutality seen in the act of the accused relates to the violation of the person of the deceased, for satisfaction of evil desires. The injuries sustained resulting into death is not suggestive of a use of force of the severe nature which can take us to the conclusion that it was brutal and in-human".*[65]

Observation/judgment of the Supreme Court:

By judgment and order dated 12 September 2012, the Supreme Court (bench of Justices B S Chauhan and Fakkir Mohamed Kalifulla) set aside the High Court judgment and remitted the matter back to the High Court for fresh order on the sentence. The Supreme Court noted that the Division Bench of the High Court of Rajasthan at Jodhpur dealt with the case in a *"casual and callous manner"* and the High Court had *"shirked its responsibility while deciding the Reference in the manner it ought to have been otherwise decided under the Code of Criminal Procedure"*. While remitting the matter the Supreme Court directed the High Court to dispose of the Reference along with the appeals expeditiously and in any case within three months considering that the conviction and judgment on the convict was imposed by the trial court vide judgment 9 March 2007.[66]

Fresh order on sentence by the High Court:

By judgment and order dated 13 February 2013, the Division Bench of the High Court of Rajasthan at Jodhpur reconfirmed the life sentence on the convict, Kunal Majumdar. The High Court observed *"In the case in hand the accused appellant was serving in Indian Air Force, he is in his quite young age and he too is having a liability to provide a good life to his own daughter. No material is available to arrive at the conclusion that he is a menace for society. Looking to all these circumstances we are having a little hope of his reformation and just to get that materlised, we are not inclined to confirm the death sentence".*[67]

Final status:

The sentence of life imprisonment awarded to Kunal Majumdar was reconfirmed by the Rajasthan High Court on 13 February 2013.[68]

Case 2. Devendra Nath Rai, Uttar Pradesh

64. Ibid
65. Ibid
66. Ibid
67. State of Rajasthan vs Kunal Majumdar, Rajasthan High Court, 13 February 2013 [Crl Murder Ref. 361, Crl Appl No.1/2007, Crl Appl No.243 of 2007 and Jail Appl No.313 of 2007] http://courtnic.nic.in/jodh/judfile.asp?ID=CRLA&nID=243&yID=2007&doj=2%2F13%2F2013
68. Ibid

Brief description of the case:

On 15 October 1991, Devendra Nath Rai, a soldier, shot dead Company Havaldar Major R S Rathore and Parthasarthi, a jawan, besides injuring two others in a drunken state. On the basis of report given General Court Martial proceedings commenced and the accused faced trial under the Army Act, 1950. There were four charges under Section 69 of Army Act. The first two charges related to commission of civil offence that is murder similar to Section 302 of the Indian Penal Code, 1860 and the other two related to civil offence i.e. attempt to murder. [69]

Judgment/observation of the Court Martial:

Based on the reports of proceedings and trial, the Deputy Judge Advocate General held that the evidence on record clearly established the guilt of the accused Devendra Nath Rai and concluded that the case clearly falls under the category of the "*rarest of rare*" doctrine and the accused deserved death sentence. The Judge Advocate General affirmed the view and the findings of the Deputy Judge Advocate General as regards the conviction and the sentence. The death sentence was confirmed by the Central Government under Section 153 of the Army Act, 1950.[70]

Judgment/observation of the High Court:

Devendra Nath Rai filed a writ application before the High Court of Allahabad questioning the conviction and the sentence imposed. The High Court held that the conviction was well merited, but felt that the case did not fall in the category of the *"rarest of rare"* cases and therefore directed the authorities to pass a fresh order on the question of sentence.

Judgment/observation of the Supreme Court:

A Division Bench of Justice Arijit Pasayat and Justice Tarun Chatterjee of the Supreme Court citing various rulings held that death sentence should be imposed *"when the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community."* The Supreme Court while remitting the matter to the High Court for fresh order on the sentence noted that the High Court without considering the balance sheet of aggravating and mitigating circumstances abruptly concluded the case as not being covered by the "*rarest of rare*" category.[71]

69. Union of India (UOI) and Ors. Vs. Devendra Nath Rai [(2006)2SCC243]
70. Ibid
71. Ibid

Acknowledgement: This report is being published as a part of the ACHR's "National Campaign for Abolition of Death Penalty in India" - a project funded by the European Commission under the European Instrument for Human Rights and Democracy – the European Union's programme that aims to promote and support human rights and democracy worldwide. The views expressed are of the Asian Centre for Human Rights, and not of the European Commission.

ASIAN CENTRE FOR HUMAN RIGHTS
[ACHR has Special Consultative Status with the United Nations Economic and Social Council]
C-3/441-C, Janakpuri, New Delhi-110058, India Phone/Fax: +91-11-25620583, 25503624
Email: director@achrweb.org; Website: www.achrweb.org